

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BILLY D. COUNCIL)	
Claimant)	
VS.)	
)	
SHILLING CONSTRUCTION COMPANY, INC.)	Docket No. 210,040
Respondent)	
AND)	
)	
UNITED STATES FIDELITY & GUARANTY CO.)	
Insurance Carrier)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Jon L. Frobish on April 3, 1998. The Appeals Board heard oral argument November 4, 1998.

APPEARANCES

Paul D. Post of Topeka, Kansas, appeared on behalf of claimant. Kristine A. Purvis of Overland Park, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant suffered a temporary exacerbation of a prior injury but no new permanent impairment or disability. In so ruling, the ALJ relied, in part, on the definition of "aggravation" found in the Fourth Edition of the *AMA Guides to the Evaluation of Permanent Impairment*. That definition limits an "aggravation" to a worsening of the impairment by 3 percent or more. On appeal, claimant contends the accident caused more than 3 percent additional permanent impairment. Claimant also argues that the Fourth Edition of the *AMA Guides* does not apply because it was not adopted by the legislature until 1996, after the date of accident in this case.

The amount of claimant's average weekly wage has also been made an issue on appeal. The ALJ made no specific finding as to average weekly wage; it was not necessary because he found no permanent impairment. Respondent has stipulated that the wage was high enough for the maximum benefit. Under these circumstances, it would be necessary to find a specific wage only if work disability is awarded and it is, therefore, necessary to calculate the wage loss portion of the work disability formula.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds and concludes the Award should be modified. The Appeals Board agrees with and affirms the finding that claimant has not established a permanent impairment but concludes an award of medical expenses and temporary total disability is appropriate.

Findings of Fact

1. The accident at issue in this case occurred on November 1, 1995. While claimant and a coworker were doing maintenance work on an asphalt plant, the coworker lost his grip on a 3-pound sledgehammer and accidentally hit claimant in the face. Claimant fell backwards, landing on his right hip, back and neck.
2. Claimant had been injured approximately three years earlier, August 15, 1992, in a work-related truck accident. In that earlier accident, claimant injured his right hip, back, and knee. Claimant underwent open reduction and internal fixation of the right hip under the care of Dr. John A. Lynch. In August 1993, Dr. Joseph E. Mumford performed a total hip replacement.
3. Dr. Mumford again treated claimant after the injury of November 1, 1995. He prescribed physical therapy and epidural injections for the low back.
4. Respondent's insurance carrier also sent claimant to Dr. Jeffrey T. MacMillan for an evaluation and treatment. Dr. MacMillan first saw claimant on December 15, 1995. At that time claimant complained of stabbing pain in his right low back radiating into the right buttock and down the front and back of his right lower extremity down to the foot. He also complained of intermittent right groin pain. Dr. MacMillan recommended an MRI of both the back and right knee.

The MRI of the right knee revealed degenerative changes in the medial meniscus, minimal joint effusion, and some changes characteristic of chondromalacia. Dr. MacMillan testified those changes were consistent with either a degenerative process or a repetitive use type of injury.

The MRI of the lumbar spine revealed disk desiccation of the lower three levels with loss of disk height and some disk bulging but no evidence of spinal stenosis or disk herniation. Dr. MacMillan testified that there was no evidence of an injury on this MRI.

Dr. MacMillan saw claimant again on December 29, 1995, and on January 12, 1996. As of January 12, 1996, Dr. MacMillan concluded claimant was back to the baseline level of pain he had before the November 1, 1995, accident. Dr. MacMillan did recommend additional treatment but testified this was for residuals from the 1992 accident or due to claimant's underlying degenerative disease, not the November 1995 accident involved here.

Dr. MacMillan concluded claimant has no permanent impairment, no work restrictions, and has not lost the ability to perform any tasks from the November 1995 injury.

5. On June 10, 1994, before the injury involved in this case, Dr. Mumford provided a rating of claimant's impairment. Using the AMA Guides, Third Edition (Revised), he assigned a 20 percent impairment for the hip and a 15 percent impairment for the knee. He combined this for a whole body impairment of 13 percent. Dr. Mumford was later asked to rate the impairment to claimant's back. Dr. Mumford testified claimant has an additional 7 percent impairment for problems with the low back. In connection with that rating, he reviewed Dr. Delgado's report of 1988 back complaints. Dr. Delgado rated the impairment in 1988 as 3 to 5 percent and Dr. Mumford testified that the difference between Dr. Delgado's rating of 3 to 5 percent and his of 7 percent was attributable to the accident in 1992, not the accident at issue here.¹

6. Dr. Mumford concluded claimant had temporary impairment but sustained no additional permanent impairment from the 1995 accident at issue in this case. In reaching this conclusion, he compared MRI testing done of the low back both before and after the 1995 accident. He also noted claimant has chondromalacia in the right knee but he attributed this to the injury to the ligament in 1992. He assigned no impairment rating and no restrictions to the 1995 injury.

7. Claimant was examined by Dr. P. Brent Koprivica on February 20, 1995, and again on January 7, 1997. From the examination in February 1995, Dr. Koprivica concluded claimant has a 35 percent whole body impairment as a result of the 1992 accident. When he examined claimant again in January 1997, he found an additional 7 percent whole body functional impairment which he attributed to the November 1, 1995, accident.

¹ Dr. Mumford first described Dr. Delgado's rating as a straight 5 percent rating but revised this in the later portion of his deposition testimony to acknowledge that Dr. Delgado's 1988 rating was a range from 3 to 5 percent.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).
2. The Board concludes claimant has proven only a temporary injury resulting from the accident of November 1, 1995.
3. The Board finds respondent and the insurance carrier, as of the November 1, 1995, accident, should be responsible for the medical expenses and temporary total disability attributable to that accidental injury even though the injury was only temporary.

The ALJ described claimant's injury as an exacerbation rather than an aggravation. He relied on definitions found in the Fourth Edition of the AMA Guides which limit the term "aggravation" to circumstances where there has been at least a 3 percent increase in the functional impairment.² On the basis of that distinction, he determined the medical expenses and temporary total disability might be attributable to the claim on the 1992 accident but could not be awarded in this case.

In our view, the key question is not whether the injury was an exacerbation or an aggravation or even whether the injury was temporary or permanent. The key question is whether the injury is a natural and probable consequence of the 1992 injury or whether, instead, there has been a new accident. If the injury, temporary or permanent, is the natural and probable consequence of the 1992 injury, benefits are assignable to that earlier injury. If, on the other hand, there has been a new accident, the benefits for the injury, again either temporary or permanent, are assignable to the employer and insurance carrier for the new accident. *Burbank v. Unified School District 259*, Docket No. 223,983 (Dec. 1997).

4. In this case, the evidence establishes claimant had a new accident on November 1, 1995. That new accident is the subject of this case and medical and temporary benefits are awarded in this case.
5. Claimant is entitled to an award in this case of the temporary total disability and medical expenses previously paid by respondent and its insurance carrier including \$2,934 in temporary total disability and \$3,142.86 in medical expenses.

AWARD

² The Board agrees with claimant's contention that the Third Edition (Revised) would apply to this case because the date of accident, November 1995, was before the 1996 amendment which calls for use of the Fourth Edition.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on April 3, 1998, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Billy D. Council, and against the respondent, Shilling Construction Company, Inc., and its insurance carrier, United States Fidelity and Guaranty Company, for an accidental injury which occurred November 1, 1995, for \$2,934 temporary total disability compensation and \$3,142.86 medical expenses, all previously paid by respondent.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of November 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Paul D. Post, Topeka, KS
Kristine A. Purvis, Overland Park, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director